THE HON'BLE MR JUSTICE L.NARASIMHA REDDY

+Writ Petition No.15001 of 2007

% 09.10.2007

Between:

K. Suvaramma and others,

…Petitioners

AND

A.P. Wakf Board, rep. by its Chief Executive Officer
and another.

.....Respondents

! COUNSEL FOR APPELLANTS: Sri E. Ayyapu Reddy, Senior Counsel

^ COUNSEL FOR RESPONDENTS: Sri Shafath Ahmed Khan, S. C for R-1

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> Head Note:

? CITATIONS:

1) 2004 (3) ALT 254
2) (2003) 3 SCC 524
3) AIR 2003 SC 3044

THE HON'BLE MR JUSTICE L. NARASIMHA REDDY

Writ Petition No.15001 of 2007

Dated 09-10-2007

Between:

K.Suvaramma

…Petitioner

And

A.P. Wakf Board, rep. by its Chief Executive Officer, Hyderabad, and another.

…Respondents

THE HON'BLE MR JUSTICE L. NARASIMHA REDDY

Writ Petition No.15001 of 2007

JUDGMENT:

Respondents in I.A.No.803 of 2006 in O.S.No.136 of 2006 on the file of the Andhra Pradesh Wakf Tribunal, Hyderabad (for short '*the Tribunal*'), filed this writ petition, assailing the order dated 11-06-2007, passed by the Tribunal, granting temporary injunction against the petitioners.

The A.P. Wakf Board, and a Mosque at Kowlur Village of Kurnool District, filed the suit before the Tribunal, for the relief of perpetual injunction, in respect of the suit schedule property. The respondents pleaded that they are the owners of about 42 acres of land in Sy.Nos.126 and 128 of Kowlur village, which was said to have been endowed as *inam* to the *mosque*. According them, a *mosque* was constructed in part of the land in Sy.No.128, and major portion of the land is being utilized for agricultural purpose. It was alleged that the petitioners attempted to interfere with the possession of the respondents, over the suit schedule property, on account of the escalation of the value of lands in the neighbourhood. They also alleged that the petitioners have fabricated certain documents and tried to enter the land, with the aid of the local police, and it was ultimately urged that they are entitled to be granted an order of temporary injunction.

Petitioners filed counter-affidavits, opposing the claim of the respondents. An objection was raised as to the very maintainability of the suit, on the ground that the *mosque* was not registered. The appointment of the *muthawalli* was also alleged to be contrary to the prescribed procedure and local custom. They pleaded that they purchased various extents of land in Sy.Nos.126 and 128, from the

original owners, several decades ago, under documents, of the years 1953, 1965, 1986, 1993, 2006, etc. It was alleged that they are in peaceful possession and enjoyment of the land by raising crops, and that the suit and application were filed with a *mala fide* intention. They further pleaded that the respondents resorted to misuse of the process of law. According to them, in case the suit schedule property is held by any Wakf, and they are in unauthorized encroachments, the 1st respondent ought to have taken recourse to Section 54 of the A.P. Wakf Act (for short
'*the Act*').

Through the order under challenge, the Tribunal granted temporary injunction against the petitioners.

The petitioners contend that the Tribunal does not have the jurisdiction to entertain the suit, and that even otherwise, the order passed by it, is contrary to the record. They state that voluminous documentary evidence adduced by them, in the form of original sale deeds, *pahanis* for the corresponding periods, tax receipts, were ignored, and temporary injunction was granted, on the basis of assumptions and surmises.

On behalf of the respondents, a detailed counter-affidavit is filed. They reiterated their contention, advanced by them, before the Tribunal, and supported the order under challenge. It is urged that the writ petition is not maintainable, and if at all anything, it is only a revision under Article 227 of the Constitution of India, that can be filed.

Sri E. Ayyapu Reddy, learned Senior Counsel, appearing for the petitioners, submits that it is only a registered Wakf, that can maintain a suit before the Tribunal, under Section 83 of the Act, and the record does not disclose that the 2nd respondent was registered. He contends that the Tribunal exceeded its jurisdiction in entertaining

the suit and granting the temporary injunction, without considering the objection as to maintainability. Learned counsel further submits that the absolute title of the petitioners and their longstanding possession over the suit land, as is evident from Exs.B-1 to B-64, was totally disregarded by the Tribunal, and the order cannot be sustained either in law, or on facts.

Sri Shafath Ahmed Khan, learned Standing Counsel for the 1st respondent, and Sri Syed Shareef Ahmed, learned counsel for the 2nd respondent, on the other hand, submit that the objection raised by the petitioners, as to the maintainability of the suit, was not entertained by this Court on an earlier occasion, and that it was directed to be decided as a preliminary issue by the Tribunal.

They contend that the Tribunal had examined the documentary evidence, in detail, and on being satisfied that there exists *prima facie* case and balance of convenience, in favour of the respondents, granted temporary injunction. Learned counsel seriously raised an objection as to the maintainability of the writ petition.

Learned counsel, appearing on both the sides, have relied upon several precedents, in support of their respective contentions.

Before discussing the matter, on merits, the objection raised by the respondents, as to the maintainability of the writ petition needs to be dealt with.

The suit was filed before a Tribunal, constituted under Section 83 of the Act. The Tribunal is conferred with the power to adjudicate any dispute, question, or other matter, relating to a wakf, or wakf property, and it is deemed to be a civil Court, under sub-section (5) thereof. Sub-section (9) of Section 83 adds finality, to the orders and decisions; interim or otherwise, rendered by the Tribunal. The proviso thereof, however, confers the power on the High Court, to call for, and

examine the record, relating to any dispute or question, determined by the Tribunal, for the purpose of satisfying itself, as to the correctness, legality, or propriety thereof. Section 85 of the Act, bars the jurisdiction of the civil Courts. Section 87 is comparable to Section 69 of the Partnership Act. It bars the enforcement of rights, by unregistered wakfs. In other words,
a wakf, which is not registered under Section 36 of the Act, is barred from availing the remedies before the Tribunal.

Soon after the petitioners received notice in the suit, they approached this Court by filing W.P.No.1268 of 2007. It was urged that the suit is not maintainable, for the reason that the
2nd respondent was not registered. Another contention was that the 1st respondent is conferred with the statutory power, to remove encroachments, and that the present exercise was gross misuse of legal process. The writ petition was disposed of, directing that the maintainability of the suit shall be determined by the Tribunal as a preliminary issue.

The Tribunal passed an order of temporary injunction.
As observed earlier, sub-section (9) of Section 83 of Act, attaches the finality to the orders, and no appeal, or revision is provided. However, that finality does not effect the jurisdiction of the High Court, be it, under Article 226, or 227, of the Constitution of India. Obviously, in recognition of this legal position, the Parliament enacted proviso to sub-section (9), which provides for exercise of jurisdiction of the High Court, in such matters.

The objection raised by the respondents, about the maintainability of the writ petition, revolves, mostly around the distinction, between the proceedings under Article 226 on the one hand, and Article 227, on the other, of the Constitution of India. The

maintainability of a writ petition against an order passed by a Wakf Tribunal, was dealt with in ***Mohd. Abdul Kareem v. A.P. Wakf Board***[1]**.** That writ petition was filed against the order passed by the Tribunal, disposing of a suit finally. The writ petition was, almost in the form of an appeal. The submissions advanced on behalf of the parties, with reference to Section 83 of the Act, were examined, in detail, and ultimately it was observed that, once the jurisdiction of the Tribunal is not disputed, the party has invariably to invoke the jurisdiction of this Court, under Article 227, and not under Article 226 of the Constitution. Reference was made to the judgment of the Supreme Court in ***Sadhana Lodh v. National Insurance Co. Ltd***[2]**.** The following observation of this Court provides the necessary guidance, in this regard.

> **"Para-10**: It is not denied by the learned counsel for the petitioners that the Tribunal has jurisdiction. No provision Act or Rule is challenged before this court nor is it the case of the petitioners that principles of natural justice have been violated. The case does not fall within any exceptions to ignore the "Rule of alternative remedy". Therefore, the writ petition is liable to be dismissed".

From a perusal of the paragraph extracted above, it becomes relevant that absence of any dispute, or objection, as to the jurisdiction of the Tribunal, becomes important in determining the nature of proceedings, that may be instituted before this Court, in the context of invoking Article 226 or 227 of the Constitution.

In other words, if the proceedings are still pending before the Tribunal, and the question of its jurisdiction to entertain the suit is *writ large*, it cannot be emphatically stated that the order passed by the Tribunal is not amenable to the proceedings under Article 226 of the

Constitution of India.

Though not, as a final pronouncement, at least, as a relevant consideration, the contention of the petitioners that the 2nd respondent is not registered, becomes relevant in this context. Section 87 of the Act, which reads as under:

> **Sec.87**: "***Bar to the enforcement of right on behalf of unregistered wakfs***:- (1) Notwithstanding anything contained in any other law for the time being in force, no suit, appeal or other legal proceeding for the enforcement of any right on behalf of any wakf which has not been registered in accordance with the provisions of this Act, shall be instituted or commenced or heard, tried or decided by any Court after the commencement of this Act, or where any such suit, appeal or other legal proceeding had been instituted or commenced before such commencement, no such suit, appeal or other legal proceeding shall be continued, heard, tried or decided by any Court after such commencement unless such wakf has been registered, in accordance with the provisions of this Act.
>
> (2) The provisions of sub-section (1) shall apply as far as may be, to the claim for set-off or any other claim made on behalf of any wakf which has not been registered in accordance with the provisions of this Act".

The petitioners categorically pleaded that the 2nd respondent is not registered, and as of now, the only answer given by the respondents is that, it was notified. While notification, or publication of a wakf, is an exercise under Section 5 of the Act, registration is a separate aspect, governed by Section 36. The mere fact that an institution is notified as a wakf, does not satisfy the requirement as to registration. What becomes relevant under Section 87 is registration, and not publication. If the 2nd respondent is not registered, the very institution of suit becomes untenable. Suffice it to say that, when there

is a serious dispute, which impinges upon the very maintainability of the suit, it cannot be said that the writ petition is not the proper remedy.

Further, in ***Surya Dev Rai vs. Ram Chander Rai***[3] the Supreme Court held that the jurisdiction of the High Court, under Articles 226 and 227 of the Constitution of India, to revise the orders passed under Order 39 Rules 1 and 2 of C.P.C., is almost similar. It was in the context of the amendment caused to Section 115 C.P.C. The distinction, between the proceedings under Articles 226 and 227, was explained by the Hon'ble Supreme Court, as under:

> "**Para 25**: Upon a review of decided cases and a survey of the occasions wherein the High Courts have exercised jurisdiction to command a *writ of certiorari* or to exercise supervisory jurisdiction under Article 227 in the given facts and circumstances in a variety of cases, it seems that the distinction between the two jurisdictions stands almost obliterated in practice. Probably, this is the reason why it has become customary with the lawyers labeling their petitions as one common under Articles 226 and 227 of the Constitution, though such practice has been deprecated in some judicial pronouncement. Without entering into niceties and technicality of the subject, we venture to state the broad general difference between the two jurisdictions. Firstly, the *writ of certiorari* is an exercise of its original jurisdiction by the High Court; exercise of supervisory jurisdiction is not an original jurisdiction and in this sense it is akin to appellate revisional or corrective jurisdiction. Secondly, in a *writ of certiorari*, the record of the proceedings having been certified and sent up by the inferior court or tribunal to the High Court, the High Court if inclined to exercise its jurisdiction, may simply annul or quash the proceedings and then do no more. In exercise of supervisory jurisdiction the High Court may not only quash or set aside the impugned proceedings, judgment or order but it may also make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior court or tribunal as to the manner in which

it would now proceed further or afresh as commended to or guided by the High Court. In appropriate cases the High Court, while exercising supervisory jurisdiction, may substitute such a decision of its own in place of the impugned decision, as the inferior court or tribunal should have made. Lastly, the jurisdiction under Article 226 of the Constitution is capable of being exercised on a prayer made by or on behalf of the party aggrieved; the supervisory jurisdiction is capable of being exercise *suo motu* as well".

Ultimately, the law in this regard, was summed up in paragraph 38 (9) as under:

"**Para-38(9)**: In practice, the parameters for exercising jurisdiction to issue a *writ of certiorari* and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a *writ of certiorari* the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate Court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case".

In this view of the matter, the objection raised by the respondents, cannot be sustained, and the writ petition is held maintainable.

Now, it needs to be seen, as to whether the Tribunal had properly exercised its jurisdiction, while granting the order of temporary injunction, in favour of the respondents.

Inasmuch as what is filed is a writ petition and not a regular revision, or an appeal, against an order of temporary injunction, the effort of this Court would be only to see, whether the Tribunal had followed the settled principles of law, while passing the order.

One of the settled principles, while considering an application for grant of temporary injunction, or for that matter, in deciding a suit for perpetual injunction, is that, where a particular state of affairs is shown to have continued for a considerable period, the party pleading the change of it, is required to satisfy the Court, as to the manner in which such change has taken place. The state of affairs, particularly as regards the enjoyment of rights of ownership and possession, cannot depend just upon the *ipsi dixit* of the concerned parties. The party pleading the change, is required to satisfy the Court as to the manner as well as legality.

In the instant case, the documents presented on behalf of the respondents, *vis-à-vis*, the rights of ownership over the land, are of the year 2006. On their part, the petitioners have filed original sale deeds, which are of the years 1947 (Ex.B-47); 1953 (Ex.B-37); 1965 (Ex.B-26); 1978 (Ex.B-8); 1985 (Ex.B-45); 1986 (Exs.B-3, B-5, B-6 and B-25); 1992 (Ex.B-7), and 1993 (Exs.B-2, B-4, B-11, B-12 and
B-24) etc. Apart from the title deeds, the petitioners have also filed the pattadar passbooks; copies of pahanies, and tax receipts,
for number of years. Possession certificates were also filed, being Exs.B-18, B-19, B-60 and B-66. It was not even alleged that the sale deeds and other records, reflecting possession of the petitioners, were not genuine or fabricated. Being registered documents of more than 30 years, many of them carried the presumption, provided for under Section 90 of the Evidence Act.

Heavy burden rested upon the respondents to show, as to how,

such a longstanding possession of the petitioners had ceased, and as to how the petitioners have acquired the same. Absolutely,
no attention was bestowed in this regard. It is not even alleged that, what is the form of agriculture, being undertaken over the land. No third party affidavits of the cultivators, or those, who assisted the petitioners, in the cultivation of the land; were filed. The petitioners, on the other hand, placed voluminous evidence before the Tribunal, to establish their possession over the land.

Another important aspect of the matter is, that the 1st respondent is conferred with the statutory power under Section 54 of the Act, to remove encroachments. It is no doubt true that the 1st respondent can, by itself, file a suit. But, in the context of verifying the conduct and genuineness of claim, the absence of any proceedings, on the part of the 1st respondent, before the suit came to be filed; would have its own significance. It is not as if any steps, initiated by the 1st respondent, have proved futile.

Under these circumstances, this Court finds that the order of temporary injunction, granted by the Tribunal, cannot be sustained in law, or on facts.

The writ petition is accordingly allowed, and the order in I.A.No.803 of 2006, dated 11-06-2007, is set aside. There shall be no order as to costs.

L. NARASIMHA REDDY, J.

Dt. 09-10-2007.

Note:
L.R. copy to be marked.
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[1] 2004 (3) ALT 254

[2] (2003) 3 SCC 524

[3] AIR 2003 SC 3044